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IN THE

Supreme Court of the United States

October Term, 1969
No. 496

ALFRED TENNYSON COWGILL,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court, Los Angeles County, State of California.

JURISDICTIONAL STATEMENT.

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On Appeal From the Appellate Department of the Superior Court, Los Angeles County, State of California.

JURISDICTIONAL STATEMENT.

Appellant appeals from a judgment of the Appellate Department of the Superior Court for the County of Los Angeles, State of California, entered May 27, 1969, affirming an order of the Municipal Court of the South Bay Judicial District, State of California, entered on December 18, 1968. The said Municipal Court, having found appellant guilty of a violation of Section 614(d) of the California Military and Veterans Code, ordered Appellant placed on summary probation for one year subject to the terms and conditions that Appellant commit no further violations "of this nature," and that he pay a fine of $250.00 or serve 25 days in the County Jail.

OPINIONS BELOW.

The trial judge in the Municipal Court did not render a written opinion. The Appellate Department of the Superior Court rendered a Memorandum Opinion and Judgment (see Appendix A). Thereafter, on Appellant's petition that the cause be certified to the California Court of Appeal, the Appellate Department of the Superior Court issued an order granting such certification (see Appendix B), and an order certifying the cause to be transferred to the Court of Appeal (see Appendix C). The Court of Appeal, however, on June 18, 1969 denied such transfer (see Appendix D). The Appellate Department opinion and judgment are now published in 274 A.C.A. 174, and in 78 Cal. Rptr. 853.

JURISDICTIONAL GROUNDS.

Appellant was charged with violation of Section 614 (d) of the Military and Veterans Code of the State of California. He was tried without a jury by the Municipal Court of the South Bay Judicial District in the County of Los Angeles, and found guilty. Upon appeal to the Appellate Department of the Superior Court for the County of Los Angeles, the order of the Municipal Court was affirmed by the Appellate Department on May 27, 1969 (Appendix A).

In view of the California Court of Appeal's refusal to consider this case (Appendix D), the judgment of the Appellate Department of the Superior Court constitutes a judgment rendered by the highest court of the State of California in which a decision can be had, so that pursuant to 28 U.S. Code Sec. 1257(2) this Court now has jurisdiction to review on appeal the judgment

below. See *Robinson v. California,* 370 U.S. 660, 664 8 L. Ed. 2d 758, 761, 82 S. Ct. 1417 (1962); *Smith v. California,* 361 U.S. 147, 149, 4 L. Ed. 2d 205, 208, 80 S. Ct. 215 (1959). Notice of Appeal to this Court was filed in the Appellate Department of the Superior Court on August 5, 1969.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are the First and Fourteenth Amendments, U.S. Const. Amend. I, Amend. XIV, Sec. 1.

The statutory provision involved is Section 614(d) of the Military and Veterans Code, State of California. Section 614 reads in its entirety as follows:

> "*Offenses in connection with flags.* A person is guilty of a misdemeanor who:
>
> "(a) In any manner for exhibition or display, places or causes to appear any work, figure, mark, picture, design, drawing, or any advertisement of any nature upon any flag of the United States or of this State.
>
> "(b) Exposes to public view any such flag upon which is printed, painted, or placed or to which is attached, appended, affixed, or annexed any word, figure, mark, picture, design, drawing, or any advertisement of any nature.
>
> "(c) Exposes to public view, manufactures, sells, exposes for sale, gives away, or has in possession for sale or to give away or for use for any purpose any article or substance being an article of merchandise or a receptable of merchandise or article or thing for carrying or transporting merchan-

dise upon which is printed, painted, attached, or placed a respresentation of any such flag, standard, color, or ensign to advertise, call attention to, decorate, mark or distinguish the article or substance on which so placed.

"(d) Publicly mutilates, defaces, defiles, or tramples any such flag." (Stats. 1935, c. 389, p. 1377, Sec. 614).

QUESTIONS PRESENTED.

1. The major question here presented is:

Whether a public act of flag defilement, unaccompanied by words, but also unaccompanied by actual or threatened violent or injurious conduct, is entitled to protection as "symbolic speech" under the First and Fourteenth Amendments.

Within this basic question are subsumed the following subsidiary questions:

a. Is the expression of ideas by conduct entitled to the same protection as the expression of ideas by words provided the conduct itself is unobjectionable only in its expression of ideas?

b. Does a public act of flag defilement necessarily and in all circumstances constitute an incitement to others to commit unlawful acts?

c. Is the governmental interest in prohibiting public flag defilement an interest unrelated to the suppression of free expression?

d. May the wearing of a garment of clothing constitute symbolic speech?

2. The following additional questions are also presented:

a. If the only conceivable violent reaction to a given speech (symbolic or otherwise) is from an audience hostile to the speaker, may the speech be abridged absent a showing of the inability of the police to control the threatened violence?

b. Does it constitute a deprivation of liberty without due process of law to convict a person for public defilement of a flag where the only evidenced offered of such defilement is the act of wearing a vest made out of a flag?

c. Does it constitute a deprivation of property without due process of law to prohibit a person from converting cloth (in the form of a flag) which he owns into a garment of clothing?

STATEMENT OF THE CASE.

The Appellant purchased an American flag, and requested his girl friend to make the flag into a vest [Settled statement on appeal, Clerk's Transcript of Record (hereinafter cited as "R."), p. 6, lines 24, 25]. She did so, making the vest in the privacy of Appellant's home. [*Ibid.*, p. 6, lines 26-27]. (Note the typographical error in the Settled Statement at R., p. 6, line 26, in which the word "plaintiff's" should read "defendant's.") Appellant wore the vest on election day, November 5, 1968, because he thought the vest "attractive" [R. p. 6, line 28] and because he considered it "appropriate" to wear it on such a day [*Ibid.*, lines 28-30]. Appellant voted for Hubert Humphrey for President on said day [*Ibid.*, lines 30, 31]. At approximately

4:15 p.m. Appellant was wearing the vest while standing with a group of ten to fifteen young people on the sidewalk in front of Winchell's Donut Shop in Hermosa Beach [R. p. 5, lines 29-32]. No evidence was offered indicating or suggesting that Appellant was engaged in, about to engage in, threatening, or inciting any acts of violence, or that any persons in the vicinity were engaged in, threatening, or about to engage in any acts of violence. Hermosa Beach Police Officer, Gary O. Dalrymple, accompanied by Officer Jon L. Schmolle, approached Appellant and asked him to voluntarily accompany them to the Hermosa Beach Police Department [R. p. 6, lines 3, 4]. Appellant complied with this request without any resistance whatsoever [*Ibid.,* line 5]. At the police department Appellant was placed under arrest for violation of California Military and Veterans Code Sec. 614(d). Upon being placed under arrest Appellant stated: "Couldn't you let it slide, it's election day." [*Ibid.,* lines 11-12].

The Complaint charged Appellant with violation of Section 614(d) of the California Military and Veterans Code, alleging that he did "wilfully and unlawfully multilate and expose to public view, a flag of the United States, in such a way as to deface, disfigure, tarnish, defile and bring dishonor upon it by cutting and sewing it into a piece of wearing apparel, to wit: a vest, and wearing it in public." [R. p. 2]. At the trial, held without a jury, the Appellant was found guilty, and was placed on summary probation, subject to the terms and conditions that Appellant must engage in "no further violations of this nature" and must "pay a fine of $250.00 or serve 25 days in the County Jail" [R. p. 68].

The constitutional issues here raised were first raised at the trial, both on a Motion For Entry of Judgment of Acquittal, and in legal argument prior to the trial court's passing sentence. In each instance the trial court in its holdings ruled against the Appellant in connection with such constitutional issues [see R. p. 7, lines 11-32; p. 8, lines 1-11]. The same constitutional issues were briefed and argued on appeal before the Appellate Department of the Superior Court.

THE SUBSTANTIALITY OF THE FEDERAL QUESTIONS PRESENTED.

POINT I.

This Case Squarely Poses the Status of Symbolic Speech Under the First and Fourteenth Amendments.

(a) The Factor of Incitement to Unlawful Acts Is Not Here Involved.

The present case affords this Court the opportunity to clarify a crucial area of First Amendment protection. It squarely poses the question raised but left unanswered in *Street v. New York,* 394 U.S. 576, 89 S. Ct. 1354 (1969). That is, whether an *act* of flag mutilation or defilement may be protected under the First Amendment. Moreover, it raises the question in a factual setting that significantly differs from *Street* so as to exclude factors which tend to obscure the status of symbolic speech. The *Street* case dealt with flag *burning,* while in the present case the flag was converted into a garment of clothing. The fact of burning was relied upon by the New York Court of Appeals in upholding the conviction of the defendant in that case.

The New York Court found that flag burning "was an act of incitement, literally and figuratively 'incendiary' and as fraught with danger to the public peace as if he had stood on the street corner shouting epithets at passing pedestrians." (*People v. Street,* 20 N.Y. 2d 231, 237, 282 N.Y.S. 2d 491 (1967)). Even if one agrees with this characterization by the New York Court of Appeals, it is a very different case where the flag is not burned, but is rather used as a vest. Such use of the flag is clearly neither literally nor figuratively incendiary. Indeed, that fictional personification of patriotism, "Uncle Sam," is widely known to wear a vest as well as other articles of clothing made out of a flag, and no one remotely regards this as an incitement to violence. Particular circumstances are conceivable where the wearing of a flag-vest might constitute an act of incitement, but nothing in the record of this case remotely suggests that such was the case here. Indeed, the record suggests that Appellant was not even seeking to convey a message hostile to "the establishment" in view of the fact that he wore the vest on the day he voted for Hubert Humphrey [R. p. 6, lines 30-31], but was rather expressing his idea of "appropriate" wearing apparel on Election Day [*Ibid.,* lines 28-30]. In any event, there was no evidence of any threat of violence either by Appellant, nor by any observers either sympathetic or hostile to Appellant. In such circumstances, a remote fear that some unidentified person *might* express a violent reaction to Appellant's vest is insufficient to deprive him of his First Amendment rights. As this Court recently said in another case involving an article of wearing apparel as symbolic speech, *Tinker v. Des Moines Independent Community*

School District, 393 U.S. 503, 89 S. Ct. 733, 737 (1969):

> ". . . in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."

(b) Mr. Justice Fortas' Rationale in His *Street* Dissent Is Likewise Here Inapplicable.

Although the majority opinion in *Street v. New York, supra,* does not deal with the status of flag mutilation and defilement by acts rather than by words, four dissenting Justices did express the view that such an act may not be protected by the First Amendment. Of these, two (Mr. Chief Justice Warren, and Mr. Justice White) found it unnecessary to express any reason for this conclusion. Mr. Justice Black endorsed the New York Court of Appeal's opinion, which we believe to be distinguishable from the present case for reasons stated in Par. (a) *supra.* Mr. Justice Fortas' dissent offered a somewhat different rationale:

> "If, as I submit, it is permissible to prohibit the burning of personal property on the public sidewalk, there is no basis for applying a different rule to flag burning." (394 U.S. at p. 616; 89 S. Ct. at p. 1378).

This approach treats the flag like any other item of personal property and asserts that the State may properly prohibit public burning of any property. But, if the flag in this case is treated like any other bolt of cloth, to apply the Fortas reasoning here it would have to be concluded that the State could properly prohibit citizens from sewing bolts of cloth which they own into wearing apparel and thereafter from wearing such ap-

parel in public. Such an arbitrary enactment would surely raise most serious questions of due process. See Point III *infra*. Clearly, then, this rationale by Mr. Justice Fortas is inapplicable to the present case.

(c) In View of This Court's Decision in *Street*, the Doctrine of Symbolic Speech if It Is to Have Any Meaning, Must Protect Appellant's Conduct in This Case.

Although this Court has in the past given recognition to the concept of "symbolic speech" (most recently in *Tinker v. Des Moines, supra*), a definitive opinion in this area of First Amendment doctrine remains to be written. This case offers a most appropriate vehicle for such an opinion. In one sense all speech is symbolic since words are merely symbols for ideas, and it is the expression of ideas, and not particular sounds or letters on a page which the First Amendment protects. The expression of an idea is protected regardless of whether the symbol for such expression is a word or some other symbol such as a garment of clothing (*Tinker v. Des Moines, supra,* expressly recognizes a garment of clothing as a form of symbolic speech). Of course, First Amendment protection is not absolute regardless of whether the expression is by words or by other symbols. (For a discussion of limitations on absolute protection in free speech see Nimmer, "The Right to Speak from *Times* to *Time:* First Amendment Theory Applied to Libel and Misapplied to Privacy," 56 Calif. L. Rev. 935, 936-38 (1968)). If the manner in which an idea is expressed is objectionable *for reasons other than the content of the idea expressed,* then the expression may be subject to abridgment even if the expression is in words. *Kovacs v. Cooper,* 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448 (1949); *Adderley v. Florida,* 385 U.S. 39, 17 L. Ed. 2d 149, 87 S. Ct. 242

(1966). The same is, of course, true of speech expressed other than by words. Political assassination is undoubtedly one form of symbolic speech, but obviously it is not protected by the First Amendment. But the governmental interest in abridging speech must not lie merely in an objection to the idea being expressed. As this Court said in *United States v. O'Brien,* 393 U.S. 900, 88 S. Ct. 1673, 1679 (1968), a statute which abridges symbolic speech must express a "governmental interest [which] is unrelated to the suppression of free expression. . . ."

Street v. New York, supra, makes clear that *words* which constitute a defilement of the flag are protected by the First Amendment. It further makes clear that "respect for our national emblem" is not a governmental interest which may be asserted to defeat the First Amendment right to express ideas which defile the flag. *Street* expressly holds that the First Amendment protects public expression of "opinions about our flag, including those opinions which are defiant or contemptous." (394 U.S. at p. 593; 89 S. Ct. at p. 1366). But if such words are protected, is there any assertable governmental interest which would permit abridgment of the same idea if expressed by conduct rather than by words? Does an act, rather than words, of flag defilement *per se* create (in the words of *O'Brien*) a "governmental interest unrelated to the suppression of free expression . . ."? In the present case no such governmental interest may be asserted. See Paragraphs (a) and (b) *supra.* The only governmental interest that can here be asserted is a desire to protect the sanctity of the symbolism of the flag, and this is precisely an interest in "the suppression of free expression" since a symbol is by definition the expression of an idea.

(d) The Fact That Appellant Was Not Expressing Views Hostile to the Established Government of the United States Does Not Deprive Him of Constitutional Protection.

It is clear that enforcement of Section 614(d) renders liable for criminal punishment those persons who, regarding the American flag as a symbol of the national government, choose to mutilate or defile such a flag as a symbolic expression of their strong disapproval of the national government. Since such an expression would be protected (see subparagraph (c) *supra*), the statute is invalid on its face as being overbroad, and therefore may not be applied against Appellant, regardless of whether he was himself attempting to engage in such an expression. *NAACP v. Button,* 371 U.S. 415, 432, 9 L. Ed. 2d 405, 418 (1963).

Furthermore, although Appellant was not expressing hostility to the national government, he was nevertheless engaging in a form of expression. It may well be concluded from the evidence that Appellant by wearing a flag-vest was intending to express a patriotic point of view since he considered it "appropriate" to wear the garment on election day [R. p. 6, lines 28-30]. Such an expression is no less entitled to protection than is an expression hostile to the government. But whether or not this was the message being conveyed by Appellant's conduct, it is clear that he was in any event conveying another message. The very act of wearing a flag-vest is an expression of the view that a flag should not be regarded as a sacred symbol incapable of a mundane use as an article of clothing. This is an expression of opposition not to that which the flag symbolizes (*i.e.* the government and the nation), but of opposition

to the concept that any bolt of cloth must itself be regarded as "sacred". As the Jehovah's Witnesses in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943) were upheld in their refusal for religious reasons to treat the flag as a "graven image", so Appellant for secular reasons expressed the view that for himself there was no sacred or symbolic reason why a flag may not be treated like other bolts of cloth. Even if this view is unorthodox, it is certainly entitled to protection under the First and Fourteenth Amendments.

POINT II.

If the Rationale of the Appellate Department of the Superior Court Is Adopted, This Squarely Poses the Status of the Veto Power of a Hostile Audience.

The Appellate Department of the Superior Court found a legitimate state interest justifying application of Section 614(d) "in preventing breaches of the peace" [R. p. 72]. Specifically, quoting from *Halter v. Nebraska,* 205 U.S. 34, 41, 51 L. Ed. 696, 701 (1906), the Appellate Department feared a possible breach of the peace from "those who revere" the flag. For reasons set forth in Point I, par. (a) *supra,* the remote possibility of such a disturbance may not justify the abridgment of First Amendment rights. But if such a possibility were not regarded as remote, then this Court would be squarely faced with another issue of great substance. That is, can a speaker's right to speak be abridged simply because his audience is hostile?

If a speaker's right to express himself could be constitutionally obliterated because his audience so strong-

ly disagrees with his expressed views that they are willing to resort to violence, this would in effect limit First Amendment rights to those subjects which are not sharply controversial. It would further encourage hostile audiences to express their hostility through violence as a constitutionally efficacious way of removing the speaker's right to speak. That this is not correct constitutional doctrine was confirmed in *Terminiello v. Chicago,* 337 U.S. 1 (1949). In that case, the Defendant spoke under the auspices of the Christian Veterans of America, while a crowd of one thousand (1,000) persons gathered outside the building in which the speaker appeared. The crowd was "angry and turbulent" and the Defendant in his speech condemned the conduct of the crowd and "vigorously, if not viciously, criticized various political and racial groups". The Defendant was convicted under a charge of breach of the peace, which was construed by the trial court to include speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance". This Court reversed the Defendant's conviction on the ground that the breach of the peace statute as construed by the trial court constituted a violation of free speech. The Court said:

". . . a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea". (337 U.S. at p. 4).

Similarly, the fact that flag mutilation, or defilement, may stir people to anger, be provocative, and have an unsettling effect, does not justify obliteration of the guarantee of freedom of speech on the ground of a threatened or actual breach of the peace. At the very least such abridgment of speech should be permitted only where the police authorities are manifestly inadequate to control the unlawful acts of the hostile audience.

It is particularly important that this Court clarify the above point of constitutional doctrine because of its holding and opinion in *Feiner v. New York,* 340 U.S. 315, 95 L. Ed. 295, 71 S. Ct. 303 (1951), which followed *Terminiello,* and which may be regarded as inconsistent with *Terminiello.* Subsequent to *Feiner* further opinions by this Court have suggested a return to the *Terminiello* view that hostile audiences may not exercise a veto power over a speaker's right to speak, at least where police protection for the speaker would be adequate. *Edwards v. South Carolina,* 372 U.S. 229, 237, 9 L. Ed. 2d 697, 703 (1963) (speech upheld although speakers' activities did "necessitate police protection"); *Cox v. Louisiana,* 379 U.S. 536, 551-552, 13 L. Ed. 2d 471, 482 (1965); see *Gregory v. City of Chicago,* 394 U.S. 111, 89 S. Ct. 946 (1969). Still, the effect of a hostile audience on First Amendment rights remains to be definitively clarified by this Court. Such needed clarification of this substantial question could occur in the instant case.

POINT III.

Substantial Questions of Due Process Are Also Here Presented.

It is clear that if there is no evidence in the record to support a conviction, such conviction constitutes a denial of due process in violation of the Fourteenth Amendment. *Thompson v. Louisville,* 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960). Only one who "*publicly* mutilates" a flag violates Sec. 614(d). Yet the evidence is undisputed that any mutilation which occurred (*i.e.* sewing of the flag into a vest) occurred in private. [R. p. 6, lines 26-27]. The State further claims that there was public defilement of the flag. Even if the Complaint may be construed to allege this further act, the only evidence of defilement offered at the trial was Appellant's act of publicly wearing the flag-vest. This in itself may not be regarded as evidence of defilement. Wearing a flag-vest markedly differs from flag-burning where the defilement is obvious. Displaying a flag as a part of a clothing garment, on the contrary, is reasonably regarded as a celebration, not a defilement, of the flag. This Court may take judicial notice of the fact that high styles in women's clothing now include flag designs. (See Los Angeles Times, Home Magazine, February 16, 1969, pp. 16-19). Could anyone reasonably believe that "Uncle Sam's" wearing of a flag-vest defiles the flag, or that one who attends a costume party dressed as "Uncle Sam" has thereby defiled the flag?

In the present case Appellant wore the flag-vest not out of an intent to defile the flag, but because he "liked bright colors" and found the vest "attractive" [R. p. 6, lines 27, 28]. That his intent in wearing the

vest on election day was not one of hostillty to the nation or even to the established government is attested to by the fact that he voted for Hubert Humphrey for President on the day of his arrest [*Ibid.*, lines 30, 31]. It is clear both from Appellant's testimony [*Ibid.*, lines 28-30], and from the statement he made upon arrest [R. p. 2, lines 11, 12], that he wore the flag on election day precisely because he thought it "appropriate" to display the symbolism of the flag in the form of an attractive article of clothing on the day which marks an affirmation of the democratic process. This is very far from any evidence that Appellant's conduct constituted a defiling of the flag.

A separate question of due process would be raised if this Court were to conclude, contrary to the foregoing arguments, that no issue of freedom of expression is presented under the facts of this case. It would then follow that Appellant's rights with respect to the flag are the same as if the flag were any other bolt of cloth. If the flag is regarded as a "flag" and not an ordinary bolt of cloth, this is because of its symbolic significance, which brings us back to the area of First Amendment protection. If, on the other hand, the flag is treated as an ordinary bolt of cloth, then it must be recalled that the evidence established that Appellant was the owner of the cloth. [R. p. 6, line 24].

The enforcement of Section 614(d) against Appellant resulted in a deprivation of his right to use, and hence of his property in the cloth. See *United States v. Causby*, 328 U.S. 256 (1946); *Griggs v. Allegheny County*, 369 U.S. 84 (1962). A state may deprive one of his property without violating due process of

law if to do so is not arbitrary or capricious. *West Coast Hotel v. Parrish,* 300 U.S. 379 (1937). But if one ignores the symbolic significance of the flag (which is necessary if the First Amendment issue is excluded) then to deprive Appellant of the right to use cloth which he owns for the purpose of fashioning and wearing an article of clothing must surely be considered an arbitrary and capricious act of the State.

POINT IV.

The Appellate Department of the Superior Court Recognized the Substantiality of the Constitutional Questions Here Presented, and Requested a Ruling by a Higher Appellate Court.

In its opinion, the Appellate Department of the Superior Court referred to Appellant's arguments as "strongly" contending "that as applied to his actions, Sec. 614(d) is unconstitutional" (Appendix A, p. 2). Furthermore, the Appellate Department recognized the importance of the questions thus presented by granting Appellant's petition that the cause be certified to the California Court of Appeal (Appendix B), and thereupon certified to the Court of Appeal the following question:

> "Is paragraph (d) of Section 614 of the California Military and Veterans Code which makes it a misdemeanor to publicly mutilate, deface, defile or trample upon a flag of the United States constitutional when applied to an act of defilement (no words being actually spoken) which defendant claims to be protected symbolic speech under the First Amendment." (Appendix C).

Thus, the Appellate Department itself sought the ruling of a higher court on the questions here presented. However, the California Court of Appeal refused to permit a transfer of the case to its jurisdiction (Appendix D). Therefore, only this Court can now respond to the Appellate Department's request for guidance by a higher tribunal.

Conclusion.

The questions presented herein are substantial and should be accorded plenary consideration and decided by this Court.

Respectfully submitted,

MELVILLE B. NIMMER,
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Attorneys for Appellant.

APPENDIX A.

Memorandum Opinion and Judgment.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Alfred Tennyson Cowgill, Defendant and Appellant. Superior Court No. CR. A. 8379, Trial Court No. M90881.

Appeal by defendant from order granting probation ("judgment" in notice of appeal) of the Municipal Court of the South Bay Judicial District, Auten F. Bush, Judge.

Order granting probation affirmed.

For Appellant—Melville B. Nimmer.

For Respondent—Mark Wood, City Prosecutor, City of Hermosa Beach.

Amicus Curiae—Evelle J. Younger, District Attorney of Los Angeles County, Harry Wood, Head, Appellate Division, Robert Lederman, Deputy District Attorney Nathan J. Roberts.

Defendant was convicted of violating paragraph (d) of §614 of the Military and Veterans Code which makes it a misdemeanor to publicly mutilate, deface, defile or trample upon a flag of the United States. Defendant admitted that he caused a flag of the United States to be cut and sewn into a vest and wore that vest on the public streets. It is not necessary to determine whether the mutilation stopped with the cutting and sewing in private or whether the entire act of cutting, sewing and wearing were so intertwined as to be one act, at least part of which was done publicly. In

any event, we feel the evidence amply supports the implied finding of the trial court that defendant's acts defiled[1] the flag.

Appellant strongly contends that as applied to his actions, §614(d) is unconstitutional.

We face this contention bearing in mind a very recent admonition of our California Supreme Court:

> "Such deliberate acts of the Legislature[2] come before us clothed with a presumption of constitutionality. 'All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears . . .'" *In re Dennis M.* [1969] 70 A.C. 460, 469.

If §614(d) is violated by the use of words solely, then it is overly broad and cannot be enforced. A conviction under a flag descration statute based upon the use of words violates the defendant's constitutional right of free speech. (*Street vs. New York* [1969] 5 Cr. L. 3025.) We do not believe that the code section applies to words but only to acts. The substance of all

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[1]Webster's New International Dictionary, 2nd Edition, defines "defile" as "to corrupt the purity or perfection of; to debase."

[2]We are here faced with not only the deliberate act of our own Legislature but with similar acts adopted by the legislatures of the other forty-nine states and by the Congress of the United States. Every state and the United States Congress have passed flag desecration acts in one form or another. See Chief Justice Warren dissenting in *Street v. New York* [1969] 5 Cr. L. 3025, 3033. The thought of overturning such uniform legislative pronouncements except in case of a clear, compelling and unmistakable Constitutional mandate should cause any court to pause. (See *Halter v. Nebraska,* 205 U.S. 34, 40, 51 L.Ed. 696, 700.)

subsections of §614 refer to acts. While the word "defile" might be interpreted as broad enough to cover words, it may as reasonably be limited to acts only by the general connotation of the statute.

> "If the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution." (*County of Los Angeles vs. Legg* [1936] 5 Cal 2d 349, 353.)

Where a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, the court will adopt the construction which will render it valid if such can be done without violence to the reasonable meaning of the language used. This is true although the other construction may be equally reasonable. (*Miller vs. Municipal Court* [1943] 22 Cal. 2d 818, 828; *City of Los Angeles vs. Belridge Oil Co.* [1954] 42 Cal. 2d 823, 832.)

The California statute does not contain the provision "cast contempt upon either by words or act" found in the New York statute.[3] We construe the California Law as applying to acts only and hence we are faced directly with the question which the majority of the United States Supreme Court refused to determine in *Street vs. New York, supra:* do the states have power to protect the flag from *acts* of desecration and disgrace? We agree with the four justices (Chief Justice

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[3]N.Y. Penal Law §1425(16)(d) [1909] in force when *Street* was decided. Superseded by General Business Law §136d.

Warren, Black, Fortas and White) who in *Street* expressed themselves on this point. The states have this right.

We recognize that acts other than pure speech may be methods of expression of ideas which warrant the protection of the first amendment. (*In re Giannini and Iser* [1968] 69 A.C. 588. However, we, like Chief Justice Warren speaking for the Court in *United States vs. O'Brien* [1968] 391 U.S. 367, 376, 20 L.Ed 2d 672, 679, "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Even if we concede that defendant's acts were "symbolic speech" it does not follow that the same kind of freedom is afforded him by the first amendment as is afforded to those who communicate ideas by pure speech. Where speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in controlling the nonspeech element can justify incidental limitations on First Amendment Freedoms. (*United States vs. O'Brien, supra.*) The constitutional guarantee of free speech covers the substance rather than the form of communication and the State may regulate the use of a particular form if it does so from a legitimate state interest.

That legitimate state interest in protection of the flag was early recognized in *Halter vs. Nebraska* [1906] 205 U.S. 34; 51 L.Ed. 696. As stated by Justice Harlan in that case, "it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the

spot." *Halter vs. Nebraska,* 205 U.S. at 41; 51 L.Ed. at 701. The state has a legitimate interest in preventing breaches of the peace. The fact that in this case no breach occurred is immaterial. Another time a disturbance may well have resulted from defendant's actions. The state may legitimately control such activities in the interest of preventing violence and maintaining public order. (*Chaplinsky vs. State of New Hampshire* [1942] 315 U.S. 568; 86 L.Ed. 1031.)

We have previously indicated this holding in *People vs. Hornfield* [1968] Cr. A. 7782 and the only other states which have faced this problem have come up with the same answer we have here expressed. (*State vs. Schlueter* [1941] 127 N.J.L. 496, 23 A.2d 249; *Hinton vs. State* [1967] 223 Ga. 174, 154 S.E.2d 246, 249[4] and while the New York statute fell afoul to the "words" provisions (*Street vs. New York, supra*), the Court of Appeals speaking through Chief Justice Fuld makes it abundantly clear that that Court had no misgivings about the validity of a regulation of acts of desecration. (*People vs. Street* [1967] 20 N.Y.2d 231; 229 N.E.2d 187.) Order granting probation affirmed.

Dated May 27, 1969.

Whyte, *Presiding Judge*

We concur:

Vasey, *Judge*

Wong, *Judge*

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[4]Reversed on other grounds in *Anderson v. Georgia* [1968] 88 S.Ct. 902.

APPENDIX B.

Order Granting Certification.

Appellate Department of the Superior Court, of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Alfred Tennyson Cowgill, Defendant and Appellant. Superior Court No. CR. A. 8379, Trial Court No. M 90881.

The petition of appellant for certification of cause to the Court of Appeal, in the above-entitled case, having been filed and having been duly considered,

The petition is granted.

Dated June 10, 1969.

BY THE COURT.
Whyte, Presiding Judge
Vasey, Judge
Wong, Judge

APPENDIX C.

Order Certifying Cause to Court of Appeal.

Appellate Department of the Superior Court, of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Alfred Tennyson Cowgill, Defendant and Appellant. Superior Court No. CR. A. 8379, Trial Court No. M90881.

Pursuant to Rule 63(a)(b) and (c), California Rules of Court, and upon timely application by the appellant, we certify that the transfer of the above-entitled cause to the Court of Appeal appears necessary to settle an important question of law.

The question so presented is:

Is paragraph (d) of Section 614 of the California Military and Veterans Code which makes it a misdemeanor to publicly mutilate, deface, defile or trample upon a flag of the United States constitutional when applied to an act of defilement (no words being actually spoken) which defendant claims to be protected symbolic speech under the First Amendment.

By our opinion, a copy of which is attached hereto, we held that no Constitutional Right of defendant was violated and that the section as so applied was valid and enforceable against defendant.

Dated June 10, 1969.

BY THE COURT.
Whyte, Presiding Judge
Vasey, Judge
Wong, Judge

APPENDIX D.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

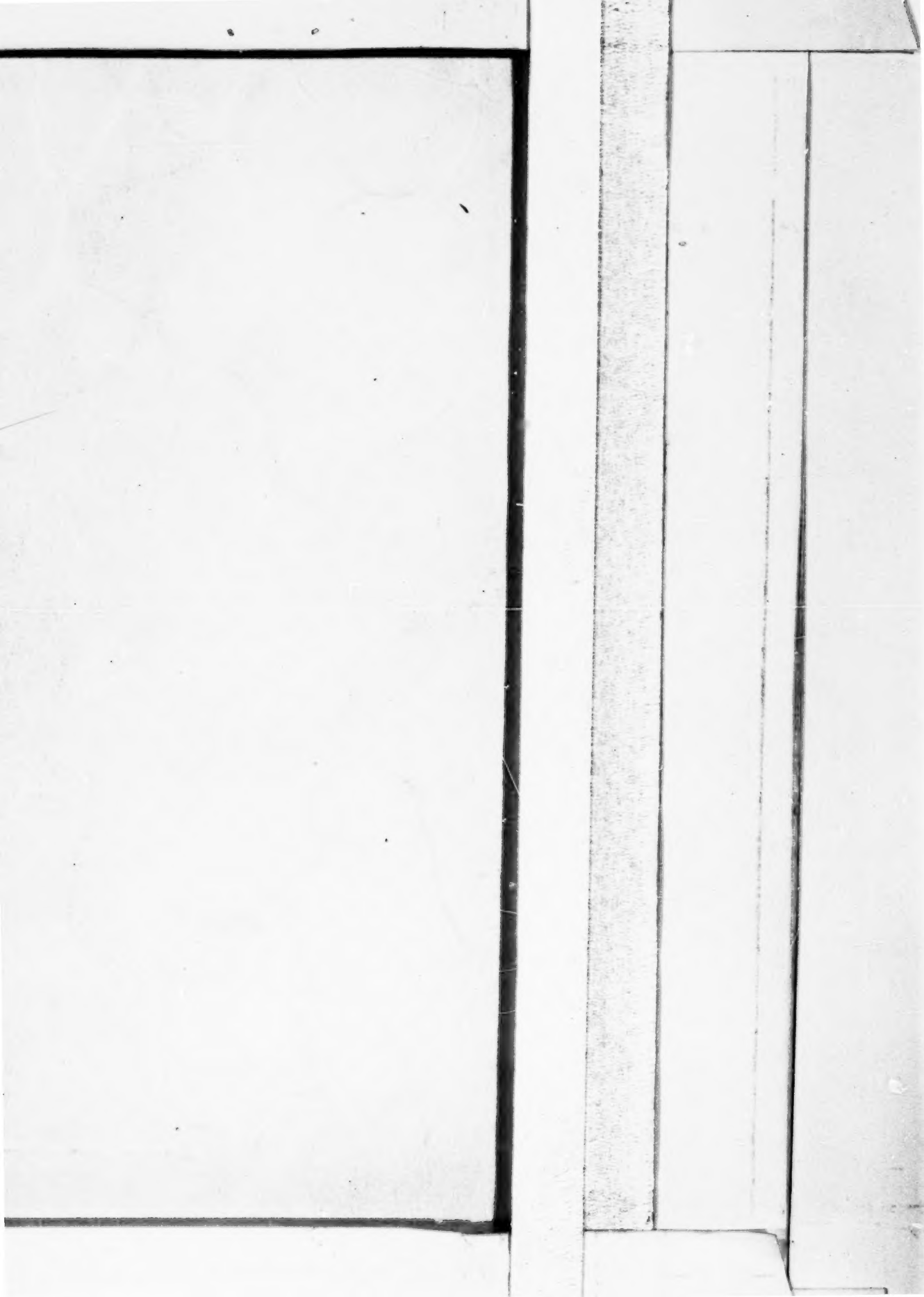
People of the State of California, Plaintiff and Respondent, vs. Alfred Tennyson Cowgill, Defendant and Appellant. 2d Crim. No. 16707, Superior Court No. CR. A. 8379, Trial Court No. M90881.

THE COURT:

The record on transfer in the above entitled cause having been filed in this Court on June 10, 1969, pursuant to certification made by the Appellate Department of the Superior Court of Los Angeles County, and this Court having considered the matter of whether such cause should be transferred to this Court for hearing and decision, now, therefore, it is hereby ordered that such transfer be and it hereby is denied.

It is suggested that the Appellate Department of the Los Angeles Superior Court publish its opinion pursuant to rule 976(d) of California Rules of Court.

Filed: June 18, 1969.



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DEC 4 1969

JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

October Term, 1969
No. 496

ALFRED TENNYSON COWGILL, *Appellant,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Appellee.*

On Appeal From the Appellate Department of the Superior Court, Los Angeles County, State of California.

MOTION TO DISMISS.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 496

ALFRED TENNYSON COWGILL,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court, Los Angeles County, State of California.

MOTION TO DISMISS.

Appellee in the above-entitled case moves to dismiss the appeal on the grounds that the questions presented are so unsubstantial as not to need further argument.

POINT I.

Most of the Questions Presented in the Jurisdictional Statement Are Not Necessary to a Determination of This Appeal and Are Not Substantial.

Appellant states that the major question here presented is whether a public act of flag defilement, unaccompanied by words, but also unaccompanied by actual or threatened violent or injurious conduct, is entitled to protection as "symbolic speech" under the First and Fourteenth Amendments. (Jurisdictional Statement, p. 4.)

In the Order Certifying Cause to Court of Appeal, which is Appendix C to the Jurisdictional Statement, the question which was certified is stated as follows:

> "Is paragraph (d) of Section 614 of the California Military and Veterans Code which makes it a misdemeanor to publicly mutilate, deface, defile or trample upon a flag of the United States constitutional when applied to an act of defilement (no words being actually spoken) which defendant claims to be protected symbolic speech under the First Amendment."

The manner in which the Appellate Department of the Superior Court stated the issue is more appropriate than the language in which the alleged major question is stated in the Jurisdictional Statement, since it appears that while Appellant claims that the act of defilement involves symbolic speech, basically the Appellate Department ruled that the states have power to protect the flag from conduct or acts of desecration and disgrace; and held that even if it be conceded that Appellant's acts were "symbolic speech," where speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in controlling the nonspeech elements can justify incidental limitations on First Amendment freedoms.

Therefore, it appears that essentially conduct, consisting of the act of flag defilement, is involved herein; and that one must unduly stretch the concept of "symbolic speech" in order to include within it the act of flag defilement.

In the Jurisdictional Statement, at page 4, Appellant states that within what it considers to be the basic

question are subsumed four subsidiary questions, which are lettered a through d. There is no real issue in this case as to whether the expression of ideas by conduct is entitled to the same protection as the expression of ideas by words. We are not concerned herein in any manner whatsoever with the expression of ideas by words; and, more particularly, we are not concerned herein with any comparison in regard to the protection to be accorded under the First Amendment to conduct in its relationship to expression of ideas by words.

Appellant raises the question as to whether a public act of flag defilement necessarily and in all circumstances constitutes an incitement to others to commit unlawful acts. There is no such issue in this case, as an examination of the Settled Statement on Appeal and the opinion of the Appellate Department of the Superior Court indicate. While the opinion of the Appellate Department does state that a state has a legitimate interest in preventing breaches of the peace and that at another time a disturbance may well have resulted from Appellant's actions, the fact that the Appellate Department made such a comment does not raise any substantial question of whether the flag defilement constitutes an incitement to others to commit unlawful acts.

Appellant states that there is a question here as to whether the governmental interest in prohibiting public flag defilement is an interest unrelated to the suppression of free expression. There is no such issue in reality in this case since it is quite apparent that the governmental interest in prohibiting flag defilement is unrelated to the suppression of freedom of expression; and that any incidental and inconsequential restriction

which Section 614 (d) of the Military and Veterans Code makes on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest. (See *United States v. O'Brien,* 393 U.S. 900, 88 S. Ct. 1673, 1679.) Furthermore, this Court may consider that Military and Veterans Code, Section 614 (d), in its prohibitions against mutilating, defacing or defiling the flag of the United States, is a regulation concerning the independent non-communicative aspect of Appellant's conduct, and hence does not violate the First and Fourteenth Amendments.

Appellant states that there is an issue in this case as to whether the wearing of a garment of clothing may constitute symbolic speech. There is no such issue herein or any substance. The Appellate Department of the Superior Court stated that they, like Chief Justice Warren speaking for the Court in *United States v. O'Brien,* 391 U.S. 367, 376,

> ". . . cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends to express an idea."

In the Jurisdictional Statement, at page 5, Appellant states that there are three additional questions presented, which are lettered a. through c. In regard to the question lettered a., there is no problem of a hostile audience here since the Settled Statement on Appeal indicates that Officer Dalrymple testified that upon his arrival he observed defendant with a group of 10 to 15 young people standing on the sidewalk in front of Winchell's Donut Shop. There is no showing of any hostility of these people towards Appellant.

As to the question labeled b., there is no real issue in this case as to whether the Due Process Clause of the Fourteenth Amendment is violated as a result of the conviction of Appellant, since as the opinion of the Appellate Department of the Superior Court states, the evidence in the instant case amply supports the implied finding of the trial court that Appellant's acts defiled the flag. (Jurisdictional Statement, Appendix A, p. 2.)

Likewise as to the alleged question lettered c., there is no serious or substantial issue in this case as to whether it constitutes a deprivation of property without due process of law to prohibit a person from converting cloth (in the form of a flag) which he owns into a garment of clothing. As Mr. Justice Fortas dissenting in *Street v. New York,* 394 U.S. 576, 89 S. Ct. 1354, 1378, stated:

> "A person may 'own' a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense, but it is property burdened with peculiar obligations and restrictions. Certainly, as *Halter vs. Nebraska,* supra, held, these special conditions are not *per se,* arbitrary or beyond governmental power under our Constitution."

After all the alleged Questions Presented in the Jurisdictional Statement at pages 4 and 5 are examined, it becomes apparent that there is only one real question in this case; and that question is the one heretofore quoted from Appendix C of the Jurisdictional Statement, as stated by the Appellate Department of the Superior Court in the Order Certifying Cause to Court of Appeal. When that particular question is analyzed, the only possible basis for the presentation of a constitutional issue when California Military and Veterans Code,

Section 614 (d) is applied to Appellant's act of defilement is that Appellant claims that such acts should be protected "symbolic speech" under the First Amendment. As the opinion of the Appellate Department of the Superior Court indicates, there is no substantial basis for concluding that the question of whether the wearing of the vest made out of the flag constitutes "symbolic speech" is of determinative significance in this case, since even if it be conceded that defendant's acts constituted "symbolic speech," it does not follow that the same kind or degree of freedom is afforded persons engaging in symbolic speech" by the First Amendment as is afforded to those who communicate ideas by pure speech. That is, where the speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in controlling the nonspeech element can justify incidental limitations on First Amendment freedoms. (See *United States v. O'Brien,* 393 U.S. 900, 88 S. Ct. 1673, 1679.)

In *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 89 S. Ct. 733 (1969), this Court specifically held that the ban by public secondary school officials on the wearing of black arm bands by students as a protest against the Vietnam war violates the First and Fourteenth Amendments to the United States Constitution. However, it is quite clear that the *Tinker* case is not dispositive of the issues herein, since the *Tinker* case involves student protests against the hostilities in Vietnam which the Court deemed akin to "pure speech." On the other hand, in the instant case Appellant testified that he wore the vest because he liked bright colors and because it was attractive; and that he wore it on the day of his arrest be-

cause it was Election Day and he considered it appropriate.

Appellant was not engaged in any activities concerning advocacy of a position in regard to political or military events or in making objections or protests of any kind. In view of the foregoing, we can even assume herein that Appellant's conduct is tinged with an aspect of "symbolic speech," and still conclude that there is no substantial question in this case which merits argument before this Honorable Court.

POINT II.

Any Issue Concerning the Status of Symbolic Speech Under the First and Fourteenth Amendments Which May Exist in This Case Is Quite Unsubstantial and Does Not Merit the Attention of This Court.

Appellant asserts that the present case affords this Court the opportunity "to clarify a crucial area of First Amendment protection." (Jurisdictional Statement, p. 7.) There is no "crucial area" involved in this case. The question of whether an act of flag mutilation or defilement may be protected under the First Amendment is of no great consequence and does not merit the attention of this court, since the conclusion that the states have power to protect the flag from *acts* of desecration and disgrace deprives Appellant of the right to correctly assert that the individual may defile the flag under the guise of "symbolic speech." The conclusion of the four justices of this court, who in *Street v. New York*, 394 U.S. 576, 89 S. Ct. at 1354, 1367-1378, expressed the view that the states have this power seems to be palpably correct. The fact that there is a legitimate state interest in the protection of the flag was

recognized in *Halter v. Nebraska,* 205 U.S. 34, 51 L. Ed. 696, where this court held that a Nebraska statute which made it a misdemeanor to use representations of the national flag on articles of merchandise for advertising purposes did not deny any privilege of American citizenship, did not infringe the right of personal liberty guaranteed by the Fourteenth Amendment, and did not invade any property rights without due process of law. At most the application of the California statute to Appellant's course of conduct in this case constitutes a minimal or incidental limits upon Appellant's freedom of expression, and the overriding consideration in the substantial state interest in preventing the desecration, defilement or mutilation of the United States flag. Therefore, there is at most a rather inconsequential issue concerning symbolic speech in this case.

Appellant asserts at page 10 of the Jurisdictional Statement that this case offers a most appropriate vehicle for a definitive opinion concerning the concept of "symbolic speech." The record herein demonstrates that Appellant was being punished for his acts and conduct alone, and it is necessary to stretch the term "symbolic speech" in order to find that it exists at all in this case.

POINT III.

There Is No Substantial Issue in This Case Concerning the Status of the Veto Power of a Hostile Audience.

As indicated heretofore, in Point I hereof, there is no legitimate issue herein of the veto power of a hostile audience, since there was no hostile audience in this case. The mere reference to possible breaches of the peace in the opinion of the Appellate Department of

the Superior Court (Jurisdictional Statement, Appendix A, p. 5) was made for the purpose of indicating that the state may legitimately control activities in the interest of preventing violence and maintaining public order. This incidental reference near the conclusion of the opinion of the Appellate Department does not result in any issue in regard to a hostile audience being present in this case.

POINT IV.

There Are No Substantial Questions of Due Process Presented Herein.

It is submitted that the conclusion of the Appellate Department of the Superior Court that the evidence amply supports the implied finding of the trial court that Appellant's acts defiled the flag is the only reasonable conclusion which could be drawn from the facts presented in the instant case. In its opinion, the Appellate Department stated:

> "Defendant admitted that he caused a flag of the United States to be cut and sewn into a vest and wore the vest on the public streets. It is not necessary to determine whether the mutiliation stopped with the cutting and sewing in private or whether the entire act of cutting, sewing and wearing were so intertwined as to be one act, at least part of which was done publicly. *In any event, we feel the evidence amply supports the implied finding of the trial court that defendant's acts defiled the flag.*" (Emphasis added.)

It is submitted that under the facts found, as stated above by the Appellate Department, there is no issue herein involving an alleged denial of due process of

law, since the evidence in the record is sufficient to support the judgment of conviction.

Appellant's argument, at page 17 of the Jurisdictional Statement, that the enforcement of the statute in question against Appellant resulted in a deprivation of his right to use, and hence of his property in the cloth, does not present a question of any substance in regard to violation of the Due Process Clause of the Fourteenth Amendment. Furthermore, the dissenting opinion of Mr. Justice Fortas in *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354, 1377-1378, contains a complete answer to such assertion.

POINT V.

The Fact That the Appellate Department of the State Superior Court Requested a Decision by a Higher Appellate Court in California Does Not Lead to the Conclusion That There Are Any Substantial Questions Involved Herein.

In the Jurisdictional Statement, as Appendix C, there is an order of the Appellate Department of the Superior Court Certifying Clause to the Court of Appeal. That order contains an accurate statement of the real question presented in this case. As Appendix D of the Jurisdictional Statement indicates, the Court of Appeal of the State of California ordered that the transfer of the cause to itself be denied. The latter court, however, suggested that the Appellate Department of the Los Angeles Superior Court publish the opinion which it had rendered.

The fact that the Court of Appeal refused to transfer the cause, after request for certification was made by the Appellate Department, merely indicates that the

Court of Appeal did not find any basis for the conclusion that the Appellate Department committed error in connection with its determination of the appeal. In other words, the Court of Appeal was satisfied that the opinion of the Appellate Department and the reasoning thereof were fundamentally sound; and that, in the event the case would have been before the Court of Appeal, the same disposition would have been made by that court as was made herein by the Appellate Department.

Furthermore, it may be implied from the fact that the Court of Appeal refused to order that the matter be transferred to it, that said Court of Appeal agreed with the statement of the issue in the Order Certifying the Cause to the Court of Appeal. Appellee submits that the only correct statement of the issue presented in this case is the statement in the Order Certifying Cause to Court of Appeal. (Jurisdictional Statement, Appendix C.) In analyzing the question so presented, the most that can be said for Appellant's contentions herein is that Appellant claims the act of defilement of the flag is protected as "symbolic speech" under the First Amendment the lack of substance of this claim has been noted heretofore.

Appellee submits that the opinion of the Appellate Department of the Superior Court in his case has properly analyzed the facts and has correctly applied governing principles of constitutional law to the facts. Appellee submits that in view of that opinion of the Appellate Department, there is no substantial issue for the consideration of this Court.

Conclusion.

In view of the foregoing points and authorities, it is submitted that the questions presented herein are not substantial, and the motion to dismiss the appeal should be granted by this Court.

Respectfully submitted,

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Attorneys for Appellee.

COWGILL *v.* CALIFORNIA

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

No. 496. Decided January 19, 1970

274 Cal. App. 2d 923, 78 Cal. Rptr. 853, appeal dismissed.

Melville B. Nimmer and *Laurence R. Sperber* for appellant.

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *Evelle J. Younger* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

MR. JUSTICE HARLAN, with whom MR. JUSTICE BRENNAN joins, concurring.

While I am of the view this appeal should be dismissed, I deem it appropriate to explain the basis for my conclusion since the issue tendered by appellant—whether symbolic expression by displaying a "mutilated" American flag is protected from punishment by the Fourteenth Amendment—is one that I cannot regard as insubstantial. See *Street* v. *New York,* 394 U. S. 576, 594 (1969).

The record before us is not in my judgment suitable for considering this broad question as it does not adequately flush the narrower and predicate issue of whether there is a recognizable communicative aspect to appellant's conduct which appears to have consisted merely of wearing a vest fashioned out of a cut-up American flag. Such a question, not insubstantial of itself, has been pretermitted in the Court's previous so-called

"symbolic speech" cases where the communicative content of the conduct was beyond dispute. See *Tinker* v. *Des Moines School District*, 393 U. S. 503 (1969); *Gregory* v. *City of Chicago*, 394 U. S. 111 (1969); *Brown* v. *Louisiana*, 383 U. S. 131 (1966); *Bell* v. *Maryland*, 378 U. S. 226 (1964); *Garner* v. *Louisiana*, 368 U. S. 157, 201 (concurring in judgment) (1961); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 632 (1943); see generally Note, Symbolic Conduct, 68 Col. L. Rev. 1091 (1968). The Court has, as yet, not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression.*

While appellant contends that his conduct conveyed a symbolic message, the stipulated statement of facts on which this case comes to us suggests that the issue was not, in the first instance, determined as a factual matter by the trial court. Further, there is no indication that appellant either presented evidence on this question at trial or urged any standard at trial for determining that issue. I would therefore dismiss this appeal based on the inadequacy of the record for deciding the question presented. *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947); *DeBacker* v. *Brainard*, *ante*, p. 28.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

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*Chief Justice Warren, writing for the majority in *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968), said: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." The Court went on, however, to take judicial notice of the symbolic significance of draft-card burning which had become a recognized way of protesting the draft and American involvement in Vietnam.